CF0000062658

(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

CR. APPEAL NO. 2818 OF 1999

1. Panchobai wife of Vedram,
   aged 55 years.
2. Panakram son of Dileram,
   aged 40 years.
   Both resident of village
   Pipara, P.S.Shivarinarayan
   Tahsil Janjgir, District
   Janjgir-Champa, MP.

..APPELLANTS
(IN JAIL)

VS.

THE STATE OF MADHYA PRADESH .. RESPONDENT

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CRIMINAL PROCEDURE CODE:

| CONVICTION: | SENTENCE |
|---|---|
| Appellant No.1 Panchobai. | |
| U/s 302 IPC. .. | Imprisonment for life and and fine of Rs.1000/-. In default, R.I.for 6 months. |
| Appellant No.2 PANAKRAM: | |
| U/s 302/34 IPC. .. | Imprisonment for life and fine of Rs.1000/-.In default, R.I.for six months. |

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

# आदेश पत्रक

मामला क्रमांक CrA.No.288/99 सन् 200

विरुद्ध

| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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**Division Bench:-**

**Hon'ble Shri L. C. Bhadoo and**
**Hon'ble Shri Dhirendra Mishra, JJ.**

**28-2-2006**

Shri Gautam Khetrapal, counsel for the appellants.

Shri U.N.S. Deo, Additional Public Prosecutor with Shri M.P.S. Bhatia, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais*.

**Per L. C. Bhadoo J**

By this appeal under Section 374 (2) of the Cr.P.C. accused/ appellants Pancho Bai and Panak Ram have questioned the legality and correctness of the judgment of conviction and order of sentence dated 28th September 1999 passed by learned Additional Sessions Judge, Janjgir in S.T. No.326/98 whereby learned Additional Sessions Judge convicted accused/appellant Pancho Bai for commission of offence under Section 302 of the I.P.C., sentenced her to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for 6 months and convicted accused/appellant Panak Ram for commission of offence under Section 302 read with Section 34 of the I.P.C., sentenced him to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for 6 months.

Case of the prosecution, in brief, is that Shivlal (PW-1) lodged the report in the Police Outpost Navagarh to the effect that on Tuesday i.e. 5-5-98 at about 11 a.m. he returned from his agricultural field and saw that Pancho Bai, Kumari Bai and Panak Ram, all the three, were saying to Maheshi Bai that you are a witch~~craft~~ and you have practiced

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित -2- | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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witchcraft on their daughter and she has been treated after paying Rs.500/-. Pancho Bai was quarrelling with Maheshi Bai which was heard by him and Brijlal. Today night at about 11 p.m. when he was sleeping in his house, he heard noise, woke up and saw that on the pond adjacent to the house Maheshi Bai was sitting in a burnt condition. He went near to her and enquired from her on which she disclosed that in the night she was sleeping in her house, Pancho Bai came and set her on fire after pouring kerosene on her body and she ran away. Maheshi Bai further said that she saw Pancho Bai running away. Maheshi Bai was also running away after coming from her house and Panak Ram was restraining her carrying a Lathi in his hand. She stopped at her a the pond. Receiving this report K.S. Gahlot (PW-14) A.S.I. registered F.I.R. under Ex.-P/1 and recorded the dying declaration (Ex.-P/2) of Maheshi Bai. She was sent for treatment to the Primary Health Centre, Janjgir where she succumbed to the burn injuries on 7-5-98 at about 7.30 a.m. while she was under treatment. The postmortem was conducted by Dr. U.C. Sharma and he prepared the postmortem report Ex.-P/9.

During investigation, Pancho Bai gave memorandum Ex.-P/11 and Panak Ram gave memorandum Ex.-P/10 to the Investigating Officer. At the instance of Panak Ram one bamboo Lathi was taken into possession under Ex.-P/13. One matchbox ~~containing~~ white Jericane from which smell of kerosene was emanating was taken into possession at the instance of Pancho Bai under Ex.-P/14. One half burnt bamboo cot from which smell of kerosene was emanating, one half burnt match stick, burnt clothes, one pair of sleeper and one half burnt blouse were taken into possession under Ex.-P/12. The site plans (Ex-P/15 & P/17)

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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of the place of occurrence were prepared. One Sari of Maheshi Bai was taken into possession under Ex.-P/24. After giving notice Ex.-P/27 to the Panchas, Panchanama Ex.-P/28 of the dead body of Maheshi Bai was prepared. The recovered articles were sent to the Forensic Science Laboratory, Sagar under Ex.-P/28 from where report Ex.-P/30 was received.

After completion of the investigation, charge sheet was filed against the accused persons in the Court of Judicial Magistrate, 1st Class, Janjgir, who in turn committed the case to the Sessions Judge, Bilaspur from where learned Additional Sessions Judge, Janjgir received the case on transfer for trial.

The prosecution examined 16 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which the accused persons denied the material appearing in the prosecution evidence against them and stated that they are innocent and have been falsely implicated in the crime. Learned Additional Sessions Judge after hearing arguments of Additional Public Prosecutor and counsel for the accused persons convicted and sentenced the accused persons as mentioned in para-1 of this judgment.

We have heard learned counsel for the parties.

Learned counsel for the accused/appellants argued that as far as accused/appellant Panak Ram is concerned, there is no evidence against him that, in any way, he participated or facilitated the burning of Maheshi Bai, therefore, his conviction is not based on legal evidence. He further argued that as far as accused Pancho Bai is concerned, she has been falsely implicated in the crime on account of animosity of the land dispute. He also argued that dying declaration in question has not been

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित -4- | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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recorded by any Magistrate and there is no medical evidence to the effect that Maheshi Bai was in a fit state of mind to give dying declaration, therefore, dying declaration does not inspire confidence. There is no other evidence indicating that Maheshi Bai was set on fire by Pancho Bai.

On the other hand, learned counsel for the State supported the judgment of the trial Court.

Having heard learned counsel for the parties, we have perused the prosecution evidence and other material available on record. As far as case of accused Panak Ram is concerned, the only allegation against him is that when Maheshi Bai after receiving the burn injuries was running towards the pond, he stopped her by carrying a Lathi in his hand. But there is no evidence that in any way accused Panak Ram was associated with co-accused or assisted the co-accused in pouring kerosene on the body of Maheshi Bai and helped Pancho Bai in setting Maheshi Bai on fire, therefore, conviction of Panak Ram under Section 302 read with Section 34 of the I.P.C. cannot be sustained as same is not based on any legal evidence.

As far as involvement of accused Pancho Bai in committing murder of Maheshi Bai by setting her on fire after pouring kerosene on her body is concerned, PW-14 K.S. Gahlot, A.S.I. has stated in his evidence that on 7-5-98 at about 2.30 a.m. Shivlal gave the report Ex.-P/1. He sent Maheshi Bai for examination of her body by the doctor under Ex.-P/18. Letter (Ex.-P/19) was sent for examination of Gangotri Bai and letter (Ex.-P/20) for the examination of Suk Bai. On 7-5-98 at about 11 a.m. in the presence of Nareshwar one half burnt cot, one blue colour plastic Chappal from which smell of kerosene was emanating,

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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one half burnt stick of the matchbox, one half burnt bed sheet, burnt clothes and one half burnt blouse were taken into possession under Ex.-P/12. He also stated that on 7-5-98 he recorded dying declaration (Ex.-P/2) of the deceased which bears thumb impression of Shivlal and Maheshi Bai. PW-13 has stated that based on the memorandum of Pancho Bai and Panak Ram recovered articles were taken into possession. One matchbox containing Jericane from which smell of kerosene was emanating was taken into possession under Ex.-P/14. In the cross-examination, this witness has stated that it is incorrect to say that dying declaration was not recorded on 7-5-98 and dying declaration was recorded in the Police Chowky. This witness has not been cross-examined to the effect that Maheshi Bai was not conscious and she was not fit to give statement. The evidence of this witness stands corroborated by PW-1 Shivlal. He has stated that Maheshi Bai was his nephew's wife. He was sleeping in his house. On hearing scream, he woke up and saw that Maheshi Bai was sitting in the courtyard in a burnt condition. He reached in the courtyard of Maheshi Bai on which Maheshi Bai on her own narrated that Pancho Bai has set her on fire after pouring kerosene on her body. He saw that her legs, hand and stomach were burnt. Witness Brijlal had also reached there and he tried to extinguish the fire. Thereafter, he and Brijlal called the Kotwar and Sarpanch was also called. They saw Maheshi Bai and said that she be taken to the police station. Thereafter Maheshi Bai was taken to the Navagarh Police Chowky on a tractor. On reaching there, Police Inspector recorded the statement of Maheshi Bai on which Maheshi Bai disclosed that Pancho Bai poured kerosene from the Gudakhu tin and thereafter set her on fire. In the cross-examination, he has stated that.

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित —6— | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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Maheshi Bai was conscious and talking. Similar is the evidence of PW-2 Brijlal who reached on the spot. This witness was cross-examined to the effect that Maheshi Bai was unconscious on which he replied that she was conscious and talking.

In this regard, the Hon'ble Apex Court in the matter of **LAXMAN V. STATE OF MAHARASHTRA** reported in **(2002) 6 SCC 710** held that

> "The Court has to decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant and for that purpose the Court looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite.

In the matter of **P.V. RADHAKRISHNA V. STATE OF KARNATAKA** reported in **AIR 2003 SUPREME COURT 2859** the Hon'ble Apex Court held that there is illegality or irregularity if the dying declaration is recorded by the police official. There is no irregularity in the absence of certification of state of mind of declarant.

In the light of above law laid down by the Apex Court, we have perused dying declaration Ex.-P/2 recorded by PW-14 K.S. Gahlot. In the dying declaration, deceased Maheshi Bai has stated that she was sleeping on the cot. At about 11 p.m. in the night Pancho Bai came and

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित -7- | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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poured kerosene on her body which was in Gudakhu tin and thereafter set her on fire with a matchbox. In reply to the question No.2 she stated that on Tuesday Pancho Bai along with Panak Ram and daughter Kumari Bai came and started quarrelling with her saying that you are a witchcraft. She was also saying that she has got treated her daughter after spending Rs.500/-. This dying declaration (Ex.-P/2) further stands corroborated by the evidence of PW-1 Shivlal and PW-2 Brijlal who have stated that they reached while Maheshi Bai was in a burnt condition. She on her own said that Pancho Bai has set her on fire after pouring kerosene on her body. They are independent witnesses and nothing has come in the cross-examination of these witnesses to show that they had any animosity against the accused, therefore, reliance can be placed on the evidence of PW-1 Shivlal and PW-2 Brijlal as also evidence of PW-14 A.S.I. Gahlot. Plastic Jericane was also taken into possession from the place of occurrence under Ex.-P/14 in which it was also mentioned that smell of kerosene was emanating from that Jericane. Same was sent for examination to the F.S.L. Sagar and as per the report of laboratory Ex.-P/30 smell of kerosene was emanating from the plastic Jericane.

PW-5 Dr. U.C. Sharma who conducted the postmortem has stated that the body of Maheshi Bai was burnt up to 70%. He further stated that smell of kerosene was emanating from the body of Maheshi Bai. Therefore, dying declaration Ex.-P/2 is corroborated by the evidence of PW-1 Shivlal & PW-2 Brijlal as also from the circumstantial evidence and the doctor's evidence that smell of kerosene was emanating from the body of the deceased.

In view of the above, we are of the considered opinion that the dying declaration of the deceased inspires full confidence of the Court in

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित —8— | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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which she has categorically stated that Pancho Bai has set her on fire after pouring kerosene on her body, as such conviction and sentence awarded by the trial Court do not suffer from any illegality or infirmity. We do not find any ground to interfere with the finding of the trial Court.

In the result,

1. As far as accused/appellant Pancho Bai is concerned, the appeal is without any merit, same is liable to be dismissed and it is hereby dismissed.

2. As far as accused/appellant Panak Ram is concerned, the appeal succeeds and same is allowed. The conviction and sentence imposed on accused Panak Ram under Section 302 read with Section 34 of the I.P.C. are set aside. He is already on bail, therefore, his bail bonds are discharged.

Sd/-
L.C.BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge

Barve

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